IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 22/12/2003

Coram

The Honourable Mr. Justice V.S. SIRPURKAR
and
The Honourable Mr. Justice M. THANIKACHALAM

W.A. No.1884 of 2003
and W.A.Nos., 1890, 1892 & 1893 of 2003
and
W.A.M.P. Nos.2613, 2621, 2623 & 2624 of 2003

M/s. South India Exports
rep. by its Partner
Mr. Indermal Ramani ... Appellants

-Vs-

1. The Joint Director of Foreign Trade
O/o Joint Director of Foreign Trade
38-39 Whites Road
Chennai 600 014

2. The Senior Intelligence Officer
Director of Revenue Intelligence
25 Gopalakrishna Iyer Road
Chennai 600 017 ... Respondents

Appeals under Cl.15 of the Letters Patent against the order dated 30-4-2003
in W.P. No.4695 of 2003, etc.

!For Appellants :: M/s. Habibullah Basha &
K.M. Vijayan, Senior Counsel for
Mr. M. Lakshmipathy and
M/s. McGan Law Firm

^For Respondents :: Mr. Arvind P. Datar, Senior Counsel for
Mr. K. Veeraraghavan, SCGSC

:JUDGMENT

V.S. SIRPURKAR, J.

Being aggrieved by the judgment of the learned single Judge of

this Court, dismissing the five writ petitions and the writ miscellaneous petitions therein, the petitioners have come up before us in these writ appeals.

2. All the petitioners are the export-oriented units. The Government of India has formulated an Export-Import Policy under Sec.3 of the Foreign Trade (Development and Reguation) Act, 1992 (hereinafter referred to as the 'Foreign Trade Act'). Under the said policy, concessions were given for imports as well as exports. On the basis of such concessions, the petitioners could import raw materials without payment of duty with the obligation to export the 'manufactured goods' from that imported raw material. The petitioners are manufacturing exporters in the sense, that they are expected to have their factories for the manufacturing of some export-material, the raw material for which is imported. This is called 'Advance Licence'. The advance licences are issued by the Joint Director of Foreign Trade, who is essentially an officer under the Ministry of Commerce, Govenrment of India and more particularly an officer working under the Central Excise Department. On the basis of that licence, the imports are permitted to be made by the manufacturing units, who hold the advance licences and after using that raw material which is imported the matching exports are expected to be made by these advance licence holders. There is a power under the Foreign Trade Act via Sec.10 in the Union Government to appoint any person, vesting him the powers such as searching, inspecting and seizing of goods, etc. and in case of the contravention of the provisions of the Act or, as the case may be, the conditions of licence, which has been dealt with under Sec.11 of the Foreign Trade Act. It is, therefore, the case of the petitioners that they can be dealt with in respect of any breach committed by them (if at all) in respect of their advance licence conditions only by the authority under the Foreign Trade Act, which authority is their licensing authority. While so, all the petitioners received the notices in the nature of a notice under Sec.108 of the Indian Customs Act issued by the second respondent, Senior Intelligence Officer, Directorate of Revenue Intelligence, who is an officer under the Customs Act in Finance Ministry. The petitioners, by this notice, were called upon to face an enquiry.

3. The petitioners challenged these notices and their case before the learned single Judge was that firstly, they could be dealt with only under the Foreign Trade Act and that too, by their Licensing Officer. They pointed out that the said notice under Sec.108 was an unnecessary harassment to the petitioners as it entailed the personal appearance of the petitioners before the concerned officer. They further plead that the concerned officer had no powers to interfere in the imports and exports made by the licence-holder since the entire exports and imports of the petitioners on the basis of the advance licence is governed under the duty-free scheme, which is monitored and governed only by the first respondent. Lastly it was contended that the notice was not issued by the Gazetted officer and hence was a nonest notice.

4. As against this, the contentions raised by the Department was that there was nothing wrong in the second respondent issuing the notice was purely for the purposes of investigation and that such a hue and cry could

not be made about the notice. It is pointed out by the second respondent that on a tip off, the second respondent came to know about the grave irregularities by these manufacturing importers. It is pointed out that these manufacturing importers had made misrepresentations regarding the fact that they owned a factory whereas, some of the petitioners had even given the fake addresses of their factory while the others did not have any machinery in that factory and their contentions that they conducted the manufacturing activity in respect of the imported raw materials was per se false. It was further suggested that merely because the licences were given under the Foreign Trade Act, it did not divest the officers of the Customs Department to make investigation and for that purpose making the efforts via Sec.108 of the Customs Act.

5. Learned single Judge held that firstly, it could not be said that the officer giving the notice was not a Gazetted officer. The learned Judge secondly found that merely because there were powers in the first respondent or as the case may be, the licensing authority to monitor the said licences, it could not be said that the second respondent was divested of his powers to investigate. In short, the contention raised was that there could not be a parallel enquiry also. Relying on the judgment of the Supreme Court, the learned Judge came to be conclusion that if there was any activity of smuggling as understood in the Customs Act, there could be no impediment in the way of the officers of the Customs Department to initiate an investigation for which purpose, a notice could always be given under Sec.108 of the Act. Holding so, the learned Judge dismissed the writ petitions, necessitating the present batch of writ appeals.

6. Arguments for the appellants were laid by Shri Habibullah Basha, learned senior counsel as also Shri K.M. Vijayan, learned senior counsel, who pointed out that there were intervening circumstances after the judgment of the learned single Judge, which made the whole enquiry as a meaningless and a fortuitous enquiry. Learned senior counsel took this stand that even if the customs authorities could be said to have jurisdiction to issue a notice under Sec.108 of the Customs Act, the whole exercise was a meaningless exercise because the authorities under the Foreign Trade Act had also issued a show cause notice to the petitioners alleging therein certain irregularities and during the pendency of these appeals, the said proceedings came to be closed holding that there was nothing wrong with the dealings of the petitioners. In fact, we were taken through the said adjudication order passed by Joint Director General of Foreign Trade, Enforcement -cum-Adjudication. It is argued that this would clinch the issue and there would be no necessity even to investigate any matter as, in fact, everything stood closed by this adjudication. Learned counsel also urged that it was a settled law by the celebrated decision of the Supreme Court in East India Commercial Company case (AIR 1962 SC 1893), which was followed later on right up to the case of UNION OF INDIVA v. SAMPAT RAJ DUGAR (1992 (58) ELT 163) and TITAN MEDICAL SYSTEMS PVT. LTD. v. COLLECTOR OF CUSTOMS, NEW DELHI (2003 (151) ELT 254) that there could be no parallel proceedings and, therefore, there would be no necessity of proceeding even with the investigation and the whole exercise wold not even be a bona fide exercise of investigating alone. We were taken through the various investigations as also through the conditions

of licence by the learned counsel, who, on that basis, contended that there was in fact no jurisdiction in the concerned officer to issue a notice under Sec.108 of the Customs Act.

7. As against this, Shri Arvind Datar, learned senior counsel appearing on behalf of the second respondent urged that what was being done was merely the investigation of certain irregularities which are suspected to have taken place. He pointed out that the department had a definite information that the information, on the basis of which the advance licence, was obtained was false in almost all the cases. He pointed out that there was no question of lack of bona fides on the part of the Department because this exercise was taken in respect of practically all the persons having the advance licence and it is only these present petitioners, who are refusing to co-operate with the department by complying with the said notice. Learned counsel argued that there was a definite information that there were no manufacturing units available which had the capacity of manufacturing the exported goods which these exporters had exported allegedly utilising the imported raw materials. He points out that there is every possibility of the imported material being siphoned off in the market and some other inferior material is being used only to complete the export obligation. He points out that there was nothing wrong in investigating the matter because after the investigation, the concerned authorities under the Customs Act could also come to the conclusion that there was nothing wrong with the dealings of the petitioners. Learned senior counsel heavily relies on the reported decision of the Supreme Court in SHESHANK SEA FOODS PVT. LTD., KARNATAKA v. UNION OF INDIA AND OTHERS (1996 (11) SCC 755) points out that this case will clinch the issue. As regards the contention of the adjudication proceedings, the learned counsel has to say that he would have nothing against that order but, in spite of that order there would still be areas left to investigate.

8. On these rival submissions, we have to see as to whether the learned Judge was right in dismissing the writ petitions.

9. We will not deal with the question as to whether the officer, who sent the notice under Sec.108 of the Customs Act, could not have sent the same owing to his not being a Gazetted officer. A statement is made on behalf of the respondents that the concerned officer is a Gazetted officer under the notification and that statement is not seriously disputed by the other side. Even otherwise, there is no reason for us not to accept the statement made by the learned senior counsel at the Bar that all such officers, holding the post of Senior Intelligent Officer, have been given the status of the Gazetted officer. Hence that question is concluded against the appellants.

10. A glance at Sec.108 of the Customs Act, under which the summons is given, would suggest that it is a power given to any Gazetted officer of the Customs Department to summon any person during any enquiry which the officer would make in connection with the smuggling of any goods. A summons can be for the production of the documents or those in possession or

under the control of the persons summoned and such a summoned person is bound to attend and to state the truth upon any subject respecting which he is examined by the summoning officer. These powers are given obviously with an idea to check the smuggling. The definition of 'smuggling' is to be found in Sec.2(39) of the Act, which is as under:

"smuggling in relation to any goods, means any act or omission which will render such goods liable to confiscation under Sec.111 or section 113"

When Sec.111 is seen, it is clear that any goods brought from a place outside India would be liable for confiscation provided under any of the eventualities described in clause (a) to (p). It will be enough for us to quote sub-section (o), which reads as under:

"Sec.111. Confiscation of improperly imported goods, etc.- The following goods brought from a place outside India shall be liable to confiscation:-

... ...

(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;"

It is therefore clear that a Customs Officer would have all the possible power and more particularly described under Sec.108 of the Act to summon any person obviously to enquire as to whether any goods have been smuggled or not. If, therefore, any goods are brought in India, which enjoy the exemption from the payment of customs duty on certain conditions then, the Customs Officer will have all the powers to enquire as to whether the conditions, subject to which the said duty is exempted, have been followed or not and it is obvious that, in case of the breach of those conditions, those goods will be smuggled goods. We, therefore, do not see as to how a simple summons issued under Sec.108 of the Act could be termed to be a proceeding without jurisdiction, when it is the inherent power of the every Gazetted officer of the Customs Department to enquire into the matter of smuggling.

11. It is tried to be suggested, more particularly from the accompanying documents of the adjudication order dated 10-10-2003, that atleast in case of the licence obtained by M/s. Varadhariya Exporters in Chennai, who are the appellants in W.A. No.1890 of 2003, in fifteen licences the export obligations had been made and the licences were also redeemed. It is urged that it is only in respect of the sixteenth licence wherein, the import values are Rs.24,47,46,004/- and Rs.26,4 3,25,684/- and that 75% of the export obligation is also over. Learned counsel for the appellants suggest that if the goods were imported and the matching exports were done under the very supervision of the Customs Officers, there will be no question of re-opening these transactions and finding out as to what really was the irregularities committed. Learned counsel also points out that show cause notices were given to all the appellants and one such show cause notices is relied upon, which is dated 13-12-2002. It is then pointed out that in that show cause notice it was alleged that the noticee diverted the duty-free imported raw material instead of utilising the same for " manufacturing" the export-product as required under the Actual User Advance Licence and no proper accounts were maintained for consumption and utilisation of the imported raw materials as prescribed in the EXIM policy and, therefore, the noticee was not eligible for Actual Users Advance Licence and misdeclared the facts and

obtained the licence in a fraudulent manner, causing loss to the tune of crores of rupees to the exchequer and, therefore, this would attract the provisions of Sec.11(1) and Sec.11(2) of the Foreign Trade Regulations Act and, therefore, the noticee was directed to show cause as to why the said licence should not be cancelled and penalties imposed. It is then pointed out that the same Joint Director General of Foreign Trade, after holding the enquiry, has exonerated the noticee-appellant and has not chosen to invoke Sec.9(4) and/or Rule 10 for cancellation of the licence.

12. We have gone through the said order very carefully. We were also taken through the relevant paragraphs wherein, it has been held that under the Foreign Trade Regulations Act and the Rules framed thereunder, the licensing authority has got ample powers to deal with the holders of the licence by bringing them to books of law (see internal page 15 para 2 therein). In that order, after quoting various paragraphs from the EXIM policy, the concerned officer has culled out seven points on which the examination would have to be made:

1. Power under the Handbook.
2. Whether it is a bonafide default?; or
3. Whether it is a malafide default?
4. Whether demand notice is issued?
5. Whether the firm is placed under Denied Entities List/ Defaulters List?
6. Whether their IEC has been suspended?
7. Concerned provisions of Foreign Trade Act, 1992 can be applied in the case, i.e. for penal case.

The officer then has given a finding that the orders redeeming fifteen licences were in order as the matching exports were done and the foreign exchange was also earned for the country. The order quotes:

"In the absence of conclusive evidence against the noticee firm for having violated the conditions stipulated in either Clause 9(4) or Clause 10 above, I would be doing a great injustice to the noticee firm in ordering the cancellation of the licence ab-initio. Even the DRI, Chennai in their letter dated 18-10-2002 have only informed that the noticee firm "appears" to have diverted the duty-free imported raw materials instead of utilising the same for the export products ... ... Although the noticee firm declared their factory address in their SSI certificate produced along with the application, one should appreciate the entire stainless steel industry and the type of machinaries they use in manufacturing the stainless steel utensils. The learned advocate had explained that the industry should not be compared with the other units having fully automated and highly complicated machines. Their industry needs a mould, a die and a pressing machine and a host of semiskilled labour force to polish and pack the goods manufactured and therefore, the manufacturing activity can be done either in a factory or in a shed for that purpose as per the capacity and the duration of the manufacturing process. During the relevant period in question the noticee firm was in possession of the SSI certificate issued by the concerned authority and no authority including the Director of Industries and Commerce questioned about the bona fide of their factory. The issue has now been highlighted by the DRI on a mere assumption that the noticee firm "appears" to

have not used those imported materials in the manufacturing process of the final product. "

These observations would suggest as if everything was alright with the manufacturing industry of the appellants. However, the learned counsel for the respondents points out that the factory, where crores of rupees worth of imported stainless steel was used for manufacturing the utensils, was, on inspection by the customs officer, found to be of having an area of 600 sq.ft. Learned counsel further pointed out that there was material on record of the customs authorities that the so-called landlord of that factory completely disowned any knowledge about the appellants or their carrying on the manufacturing activities therein. Learned counsel further suggests that in one of the appellants' case, there was no factory at all as the door number of the factory was 10-A, while there was no house bearing that door number on that street. He submits that in the wake of this, the customs authorities felt that what was being done was importing the costly stainless steels from foreign countries and disposing them of in the local market and honouring the export obligations, perhaps, with inferior quality of goods again, perhaps, without using the imported stainless steel sheets. Learned counsel suggested that with this evidence, it was necessary for the Customs Department to enquire into the matter and it was only with an objective of the enquiry that the summos was issued. Learned counsel further urges that it was fully open for all the appellants to convince the Customs authorities of their innocence and further convince them that there has been no violation of the export obligation or as the case may be the conditions of the Advance Licence.

Learned counsel wonders as to how a fault can be found in the matter of jurisdiction of the officer to issue a summons and, according to the learned counsel, the whole issue was being pre-judged.

13. The contention is undoubtedly correct. The concerned officer, who passed the order in adjudication proceeding, did not have the evidence before him nor was such evidence ever referred to in the said adjudication order. We do not mean to sit in an appeal over the said adjudication order because that is not our jurisdiction. However, we must say and express that there is hardly any reference to the evidence in that order, which evidence is undoubtedly presently available with the customs authorities as per their own claim. We fail to follow that merely because of this adjudication order, how is it that the customs authorities would be divested of any jurisdiction even to enquire into the matter. Learned counsel took us to the Foreign Trade Act and more particularly Sec.12 therein, which reads as under:

"12. Penalty or confiscation not to interfere with other punishments. -- No penalty imposed or confiscation made under this Act shall prevent the imposition of any other punishment to which the person affected thereby is liable under any other law for the time being in force."

This provision would knock out all the basis of the claim made by the appellants. All the while, the appellants have been harping that even if the customs authorities have the jurisdiction to enquire into the matter, there would be no question of any further enquiry in view of the adjudication order passed by the Zonal Joint Director General of Foreign Trade. If the appellants have smuggled the goods or have engaged themselves in smuggling of

the goods in importing the goods without paying the proper customs duty, or if they have brought exempted goods and have not complied with the conditions of which the exemption was granted, that would certainly be an act of smuggling, in which event, any concerned Customs Officer empowered under the Act would have jurisdiction to enquire. It cannot be a defence, to nip such an enquiry in the bud, that there has already been an adjudication regarding the advance licence on the basis of which the imports have been made and that such adjudication has been closed in favour of the appellants. That may be so. However, the jurisdiction of the Customs Officer to enquire into the matter would not stand concluded merely because of that. It was tried to be urged that this is the law laid down by the Supreme Court in East India Commercial Company case, cited supra, which has been followed in UNION OF INDIA v. SAMPAT RAJ DUGAR (1992 (58) ELT 163) and further in TITAN MEDICAL SYSTEMS PVT. LTD. v. COLLECTOR OF CUSTOMS, NEW DELHI (2003 (151) ELT 254.

14. On the other hand, learned counsel for the respondents urged that this question stood concluded in Sheshank Sea Foods case, cited supra. It is seen from Sheshank Sea Foods case, that it is against the judgment of the Karnataka High Court in KAMATH PACKAGING LIMITED v. UNION OF INDIA 1992 (61) ELT 548. Learned counsel for the Department took us through the said judgment of the Karnataka High Court to appraise us of the facts involved therein. That was also a case where the petitioner had the manufacturing advance licence under the Foreign Trade Regulation Act and EXIM Policy and there also, the customs authorities had issued the summons to the petitioner to furnish the details about the transactions. The learned Judge has tabulated the contentions in the following words:
"(i) that the Customs Department had no right or authority to call upon the petitioners to furnish details of the import of the raw materials and the utilisation thereof. The petitioners imported the raw materials under an advance licence granted by the Controller of Imports and Exports subject to the conditions attached to the said licence/licencees;
(ii) Any breach of the conditions should attract the jurisdiction of the concerned authority, namely the Enforcement Wing of the licensing authority and it is not for the Customs Department to exercise powers of search, seizure and confiscation. For any breach of the conditions of licence, the constituted authority under the Imports and Exports (Control) Act, is vested with ample powers to investigate and initiate action for any contravention;
(iii) Conditions under the licence and the breach thereof come under the immediate, direct and effective control of the Controller of Imports and Exports and the liability to pay customs duty would depend upon the nature of performance by the importer, which includes the utilisation, misutilisation, non-utilisation or diversion, as the case may be."
A mere look at these contentions would suggest that the contentions of the petitioners herein are identical. The learned Judge took stock of the provisions under the Customs Act like Sections 12, 25, 25(1) as also Section 25(1)(d). The learned Judge also took into consideration the conditions. Condition No.3 of the Advance Licence, which was to the effect that the goods imported against the Advance Licence shall be utilised in accordance with the provisions of the Customs Notification No.116/88 dated 30-3-1988. Condition No.2 of the Advance Licence was also referred to and ultimately, relying on

Sec.111(o) of the Customs Act, which we have quoted above, the learned Judge held that the section conferred a power of confiscation of the imported goods if they were not properly utilised and the conditions of the licence not observed. It was then held by the learned Judge that the Customs Department was thoroughly justified and had the jurisdiction to investigate or enquire into the matter. In paragraph 21 even the power of adjudication under Foreing Trade Regulation Act. Then Import and Export (Control) Act, was referred to by the learned Judge and it was held that though there was an authority for confiscation under the Foreign Trade Regulation Act, the identical powers are conferred on the authorities under the Customs Act also and that, in the case in hands, the customs authorities, on the basis of the credible information, had effected the search of the various premises of the petitioner company and seized some documents and hence the Customs Department had issued letters, calling upon the petitioner to furnish more information. In paragraph 25, the overlapping aspect in respect of the enquiries under the two enactments was also considered and in that behalf, the learned Judge referred to the decision in East India Commercial Company case, cited supra as also the subsequent decisions in BENNETT COLEMAN COMPANY v. UNION OF INDIA (AIR 1973 SC 106) and UNION OF INDIA v. OCEANIC EXPORT CORPORATION (W.A. Nos.1043 to 1049 of 1999 before the Madras High Court). The learned Judge distinguished the decision in East India Commercial Company case and chose to follow the earlier decision by the Karnataka High Court reported in POOJA EXPORTERS v. ASSISTANT DIRECTOR, DRI (1989 (41) ELT 21). The learned Judge ultimately came to the conclusion that the petition was liable to be dismissed.

15. Now turning to the case of Seshang Sea Foods case, cited supra, paragraph 2 of the said judgment would suggest that the learned Judges had considered the facts in the writ petition filed by Kamath Packaging Limited only. A similar contention was raised before the Supreme Court that only the licensing authority had the jurisdiction to investigate the violations, if any, as the duty exemption scheme, under which the licences had been issued, was a Code by itself and excluded the investigation by the Customs Authorities. The Supreme Court then in paragraph 6 referred to Sec.111(o) of the Customs Act and came to the conclusion in paragraphs 8 and 9 in the following words:

"Section 111(o) states that when goods are exempted from customs duty subject to a condition and the condition is not observed, the goods are liable to confiscation. The case of the respondents is that the goods imported by the appellants, which availed of the said exemption subject to the condition that they would not be sold, loaned, transferred or disposed of in any other manner, had been disposed of by the appellants. The Customs authorities, therefore, clearly had the power to take action under the provisions of Section 111(o).

We do not find in the provisions of the Import and Export Policy or the Handbook of Procedures issued by the Ministry of Commerce, Government of India, anything that even remotely suggests that the aforesaid power of the Customs authorities had been taken away or abridged or that an investigation into such alleged breach could be conducted only by the licensing authority. That the licensing authority is empowered to conduct such an investigation does not by itself preclude the Customs authorities from doing so."

Learned counsel for the respondents, therefore, suggests that this judgment in

Seshang Sea Foods case, cited supra, applies on all fours to the present controversy.

16. On the other hand, Shri Habibullah Basha, learned senior counsel suggests that the judgment in Sheshang Sea Foods case, cited supra, need not be followed by us more particularly in view of the judgment in East India Commercial Company case, cited supra, which is a judgment by the larger Bench and which judgment was not brought to the notice of the Supreme Court in Sheshang Sea Foods case, cited supra.

17. We are unable to accept this argument firstly, there is a very clear reference to the decision in East India Commercial Company Limited, cited supra, in the High Court judgment which fell for consideration in Sheshang Sea Foods case. We have, therefore, deliberately made a detailed reference to the High Court judgment which fell for consideration therein. We have also pointed out that in the High Court judgment, the judgment of East India Commercial Company case was clearly referred to and the learned Judge had distinguished it on the same grounds as the earlier Bench of the Karnataka High Court had done. It, therefore, cannot be said that the said judgment was not available to the learned Judges, who decided the Sheshang Sea Foods case. This is apart from the fact that East India Commercial Company case cannot be an authority for the proposition which has fallen for consideration in the present case. Heavy reliance was placed by Mr. Basha on the following observations in paragraph 27 of the majority judgment by Subba Rao, J. (as His Lordship then was) to the following effect:
"If on a reading of the said notice, it is manifest that on the assumption that the facts alleged or allegations made therein were true, none of the conditions laid down in the specified sections was contravened, the respondent would have no jurisdiction to initiate proceedings pursuant to that notice. To state it differently, if on a true construction of the provisions of the said two sections the respondent has no jurisdiction to initiate proceedings or make an enquiry under the said sections in respect of certain acts alleged to have been done by the appellants, the respondent can certainly be prohibited from proceeding with the same."
From this, the learned counsel suggests that where there was a lack of jurisdiction, the writ of prohibition will lie against the impending enquiry or investigation.

18. We have absolutely no difficulty with this proposition. However, the further question is as to whether there is anything in the judgment suggesting that there cannot be an enquiry by the Customs Department in respect of the licence not issued by it but by some other Department. Learned counsel again relied on the observations in paragraph 35, which reads as follows:
"Nor is there any legal basis for the contention that licence obtained by misrepresentation makes the licence non est, with the result that the goods should be deemed to have been imported without licence in contravention of the order issued under Sec.3 of the Act so as to bring the case within cl.(8) of S.167 of the Sea Customs Act. Assuming that the principles of law of contract apply to the issue of a licence under the Act, a licence obtained by fraud is

only voidable: it is good till avoided in the manner prescribed by law. ....
This order, therefore, authorised the Government of India or the Chief Controller of Imports to cancel such licences and make them ineffective. The specified authority has not cancelled the licence issued in this case on the ground that the condition has been infringed. We need not consider the question whether the Chief Controller of Imports or the Government of India, as the case may be, can cancel a licence after the term of the licence has expired, for no such cancellation has been made in this case. In the circumstances, we must hold that when the goods were imported, they were imported under a valid licence and therefore it is not possible to say that the goods imported were those prohibited or restricted by or under Ch.IV of the Act within the meaning of cl.(8) of S.167 of the Sea Customs Act."
Learned counsel wants to draw our attention to the fact that in this case, the imports were made under a valid licence and those imports were made under the surveillance of the Customs authorities. He further points out that at the time of importing the goods, the Customs authorities had not objected to in any manner and further the matching exports were also made and the licences were also redeemed and, therefore, there would be no question of there being any jurisdiction in the Customs authorities to enquire into the matter. When we see the majority judgment, which was read out to us, it is obvious that the learned Judges came to the conclusion that the matter was not covered under Sec.178 of the Customs Act unless there was a violation of Sec.3 of that Act. Learned Judges further held that the infringement of the condition in the licence not to sell the goods imported to the third parties was not the infringement of the order under Sec.3(1) of the Act and, therefore, the provisions of Sec.178 could not be attracted. Such is clearly not the case in our matter. We have already referred to Sec.111(o) only with an idea to suggest that any goods which were brought in contravention of Sec.111(o) could be said to be an act of smuggling and that under the provisions of the Customs Act, any Customs authority had the necessary power to initiate the enquiry or the investigation, as the case may be. Such a provision did not fall for consideration in the aforementioned judgment of East India Commercial Company case, cited supra and, according to us, this would be a distinguishing feature. We have already pointed out that the facts and the principles of law involved in Sheshang Sea Foods case, cited supra, would be almost applicable on all fours.

19. In Pooja Exporters case, cited supra, the learned single Judge of the Karnataka High Court, Justice K.A. Swami (as His Lordship then was) has given a clear reason, distinguishing the case of East India Commercial Company case, cited supra. We respectfully agree with that.

20. The other decisions which were relied upon by the learned counsel are Sampat Raj Dugar case and Titan Medical Systems case, cited supra. Considering the law laid down by the Supreme Court in Sampat Raj Dugar case, it must be pointed out that the facts therein are entirely different. There, the controversy was as to whether the importer had actually became owner of the goods. While considering the impact of Sec.111(o), the Supreme Court clarified that the occasion to take an action under this clause arises only when the condition is not observed subject to which the goods were allowed to be imported without customs duty. In that case, the goods were confiscated by

the Government on their being abandoned by the importer and that was challenged. In our opinion, the judgment in this case is not apposite to the present controversy excepting for the observations in paragraph 21, which are heavily relied upon. The observations are to the following effect:

"The next question is whether the import of the said goods was contrary to law in any manner and whether the said goods are liable to be confiscated under the Customs Act. The only provisions relied upon by the appellants are Clauses (d) and (o) in Section 111 of the Customs Act, which we have set out hereinabove. In our opinion none of these clauses are attracted in the present case. Clause (d) contemplates an import which is contrary to any prohibition imposed either by the Customs Act or any other law for the time being in force. No such prohibition can be pleaded in this case since on the date of the import the said goods were covered by a valid import licence. The subsequent cancellation of licence is of no relevance nor does it retrospectively render the import illegal. [East India Commercial Co. Ltd. v. The Collector of Customs, Calcutta - 1963 (3) SCR 338 at 372]. Clause (o) contemplates confiscation of goods which are exempted from duty subject to a condition, which condition is not observed by the importer. Occasion for taking action under this clause arises only when the condition is not observed within the period prescribed, if any, or where the period is not prescribed within a reasonable time. It therefore cannot be said that the said goods were liable to be confiscated on the date of their import under Clause (o)." (emphasis supplied)

What is very heavily relied upon is the observation that the subsequent cancellation of licence is not relevant to show that the import is illegal. From this, it is tried to be urged that if the import of the goods was not illegal then, there will be no question of enquiring into with the aid of Sec.108 of the Customs Act.

21. We do not agree. The observations therein were made in an entirely different context and in that case, the Supreme Court was not considering the question as to whether there was any jurisdiction on the part of the Customs authorities to enquire into the matter or to institute an investigation or an enquiry, as the case may be. We do not think that anything was wrong in merely starting an investigation or an enquiry, as the case may be, because the importers, appellants herein, could have even convinced the Customs authorities about the aspects of the legality of the imports. We do not see anything wrong if the Customs authorities enquiring into the matter particularly because of the power in them to confiscate such goods as contemplated under Sec.111(o) of the Act. We do realize that the goods in this case cannot be confiscated. However, as to whether the importer could be exempted from paying the customs duty would still be a question which can be gone into by the Customs authorities and in case they found to be that the exemption could not be availed by the importers, they could still be made to pay the said exemption.

22. In Titan case, cited supra, also the importer was enjoying the Advance Licence under the EXIM policy. That Advance Licence was for import of certain components for manufacture of ultrasound scanners. These imports were made on the basis of an exemption notification without paying any customs duty. However, a show cause notice came to be issued to

the appellants, enquiring as to why duty and penalty should not be levied on them for not having complied with the conditions of the exemption notification and ultimately, penalty was imposed. That was challenged before the Central Excise Gold Control Appellate Tribunal. The appeals were dismissed though after reducing the quantum of penalty. It was against that the importer went to the Supreme Court. The Supreme Court, therefore, was dealing with the said imposition of duty. In paragraph 13, it is observed:

"To be noted that the licensing authority (sic) having taken no steps to cancel the licence. The licensing authority have not claimed that there was any misrepresentation. Once an advance licence was issued and not questioned by the licensing authority, the Customs authorities cannot refuse exemption on an allegation that there was misrepresentation. If there was any misrepresentation, it was for the licensing authority to take steps in that behalf."

From this, it is suggested that it is only the licensing authority and in this case, the first respondent, which alone would be required to take any steps against the importers for the breach of conditions of the licence, etc. It is suggested that the licence in this case has not been granted by the Customs authorities and, therefore, the Customs authorities would not have any jurisdiction to initiate even an enquiry.

23. Though there will be no question of the binding principle as laid down by the Supreme Court being watered down, in our opinion, the observations have been made in an entirely different context. There was no question regarding the power of the Customs authorities to initiate investigation or the enquiry, as the case may be. Again, this was not a case of manufacturing licence but pertained to the import of raw materials under the exemption notifications issued under the EXIM Policy. The basic issued in the proposed enquiry by the Customs authorities appears to be as to whether there at all was a manufacturing factory or manufacturing unit for utilizing the imported stainless steel sheets and if such manufacturing unit was not there, how the imported stainless steel sheets were actually utilized. It is also true that the further question in that enquiry is going to be as to whether it was the imported material alone which was used in the manufacturing activity. Now, if there was no manufacturing unit available or any such manufacturing unit as would have the capacity to manufacture the goods worth crores of rupees, how was the imported stainless steel utilized. The question would not only be misrepresentation while getting the Advance Licence but also about the utilization of the imported material, which would squarely fall under Sec.111(o) of the Customs Act. In our opinion, the decision in Titan case, cited supra, also does not help the appellants.

24. Learned senior counsel for the appellants very earnestly urged that there was nothing which remained to be done particularly because:

1. The imports were cleared and the matching exports also were cleared by the Customs authorities without any demur and the licences were redeemed under the scheme.
2. A specific enquiry in respect of the misrepresentation was made in the adjudication proceedings where the appellants were exonerated.

Learned counsel argues that beyond that nothing would survive to be decided or even to be enquired into. The plea of limitation was also raised that the

transaction had become more than three years' old and as such, there will be no question of going into the aspect of payment of customs duty.

25. In our opinion, it will not be for us to see as to what would be the objective of such an enquiry. We are also not concerned with as to what transpires in the enquiry or whether the ultimate result in the enquiry could legitimately result in the payment of additional customs duty. The question is only of the jurisdiction on the part of the Customs authorities to initiate an enquiry and in case of the result of the enquiry, any proceedings are initiated against the appellants, it would be for the appellants to allege all these points in those proceedings. We do not think that the recovery of the evaded customs duty can be the only result or the fall out of the enquiry. There could be number of other issues involved, which we would be slow to discuss. In view of the fact that the enquiry has yet not been completed and it is not decided as to whether the action should ensue from the same or not, the contention that the exercise is redundant and, therefore, without jurisdiction has, therefore, to be rejected.

26. It was pointed out to us that in their counter though the 1st respondent has candidly admitted the liability of the appellants for punishment under Sec.12 of the Foreign Trade Regulation Act, in paragraph 7 a stand is taken that the issue regarding the violation of conditions of the licence can be decided only by the Licensing authority. Some halting reliance was tried to be place on this so-called admission.

27. We do not think this is an admission at all because there will be no question of there being no authority to the first respondent in enquiring into the breach of the conditions of the licence. However, that authority cannot exclude the jurisdiction of the Customs authorities to enquire into the matter.

28. We were taken through the Notification Nos.80/95 and 30/97 issued under Sec.25 of the Customs Act. In the first notification, i. e. Notification No.80/95, there is a clear reference to the export obligation being discharged after the necessary documents in support of the export are produced to the satisfaction of the Assistant Commissioner of Customs. It is pointed out that in this case, out of sixteen licences, fifteen have been so discharged and in respect of the sixteenth licence also a major portion of the export obligation has also been fulfilled. From this learned senior counsel argues that, therefore, there will be no question now of re-opening the matters particularly when the licences have been redeemed.

29. We do not think that such an approach would be a right approach to the problem. We have already clarified that even if the redemption of the licences is completed, still there would be a power in the Customs authorities to effect the investigation or, as the case may be, enquiries to see that whether there was any evasion of the Customs duty. Therefore, in our opinion, the discharge of the export obligation per se cannot put an end to the whole story.

30. In so far as the second notification, Notification

No.30/97, is concerned, a similar provision regarding the export obligation also appears there. However, there appears to be a specific clause added, i.e. Clause (vii), which is to the following effect:
"(vii) Exempt materials shall not be disposed of or utilized in any manner except for utilization in discharge of export obligation or for replenishment of such materials and the materials and the materials so replenished shall not be sold or transferred to any other person."
Learned senior counsel appearing on behalf of the Department very heavily relies on this clause and says that it is in this direction that the enquiry has to be made. We agree with the learned senior counsel that there can be a scope to enquire and the summons issued under Sec.108 of the Customs Act for effecting the enquiry such as these cannot be bad for the lack of jurisdiction.

31. It is trite law that where it is only a summons, there will be no question of considering the fall-out, at least at this stage. Learned senior counsel for this proposition has relied upon the celebrated decision in UNION OF INDIA v. PRAKASH P. HINDUJA (2003 SCC (Cri.) 1314) wherein the Apex Court held that there is no power in the Magistrate or the Court to interfere in the investigation or during the course of the investigation. Though the said decision pertains to an entirely different jurisdiction like criminal jurisdiction, learned senior counsel wants us to read the observations to be applicable even to the present proceedings, which are likely to be penal in nature. He says that even before any penalty is contemplated or ordered, the Court should not interfere in the matter of investigation. There can be no dispute about the proposition. However, in our opinion, there would always be a question of jurisdiction, as for example, if such a notice has been given by an authority of the Sales Tax Department, this Court could always have interfered on the ground of the lack of jurisdiction. Such is not the case here, which we have shown by referring to the various provisions of the Customs Act.

32. Lastly, learned senior counsel appearing on behalf of the Department expressed a great surprise over the adjudication order passed and more particularly as regards the sixteenth licence where the export obligations were almost complete to the extent of 70%. Learned counsel expressed as to what has happened to that unfulfilled part of the export obligation is still not clear and insisted that it was strange that the question should have been left open by the concerned authority in the ultimate paragraph of his order.

33. We would have nothing to say about the merits of the order as we have already expressed that it is not our task to see the correctness of the order. We do feel that the criticism, atleast about the last licence, is justified.

34. In short, there will be no question of interfering with the notice issued by the Customs Department and, in our view, the learned single Judge has correctly dismissed the writ petitions. The writ appeals are, therefore, dismissed with the costs of Rs.3,000/- each. Connected WAMPs are closed.

Jai

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